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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-32

CURTIS C. FLOOD, *Petitioner,*

v.

BOWIE K. KUHN, ET AL., *Respondents.*

PETITIONER'S REPLY MEMORANDUM

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In its brief in opposition, Organized Baseball asserts (1) that its claimed immunity from both federal and state antitrust regulation has been somehow confirmed by Congress' unwillingness to grant the antitrust exemption long sought by Baseball, (2) that Baseball must be free of every state's antitrust laws even though it is unable to show that such laws would subject Baseball to conflicting duties or impose an intolerable burden, and (3) that petitioner's antitrust claim should be left to "collective bargaining." None of these suggestions has merit.

1. Baseball argues that in the course of repeatedly declining to enact legislation exempting this one professional sport from the antitrust laws, in the face of this Court's invitation to examine the matter and intensive lobbying efforts by Baseball, Congress has

thereby conferred immunity upon it. Baseball points to Congress' failure to overrule *Toolson* and *Federal Baseball Club,* to bills favorable to Baseball which passed one House, and to committee reports which partially reflected Baseball's position. Unsuccessful bills and committee reports may, of course, be useful to illuminate the meaning of measures actually enacted into law. But there is no precedent or justification for using them as a surrogate for actual legislation. The plain fact is that for twenty years Congress has steadfastly *refused* to grant the sought after immunity. We do not infer from this that Congress thereby "intended" to subject Baseball to regulation, any more than we can accept the contrary inference urged by Baseball. Failure to legislate is simply failure to legislate. See the recent decisions of this Court on the inutility of arguments from legislative inaction, cited at p. 13 of our petition. The situation here is precisely like that involved in *Boys Markets* v. *Clerks Union,* 398 U.S. 235 (1970). In 1962, in *Sinclair Refining Co.* v. *Atkinson,* 370 U.S. 195 (1962), the Court had interpreted a hotly contested provision of the Norris-LaGuardia Act—and expressly invited legislative reconsideration. 370 U.S. at 215. Congress was pressed to respond to the invitation, but did not pass the proposed legislation. In *Boys Markets* this Court declined to read one meaning or the other into this inaction, but itself reconsidered its earlier decision on the merits and overruled *Sinclair.* It should do the same to *Toolson* and *Federal Baseball Club.*

2. Baseball's argument as to state regulation is no more persuasive. Having argued to this Court in 1922 and again in 1953 that it should be granted immunity from federal regulation because it was already subject

to adequate state and local regulation, Baseball now seeks to evade the antitrust laws of every state. The interests of justice and ordinary logic require that *Toolson* and *Federal Baseball Club* should either be overruled and Baseball subjected to federal regulation,[1] or applied—and Baseball subjected to state law. Baseball should not be permitted to continue to have it both ways. In any event, Baseball has omitted even to respond to the abundantly documented contention that there is no precedent in this Court, or in reason, for wholesale displacement of every state's antitrust laws where there has been no "particularized inquiry" into the nature or impact of any of those laws, and no showing that they are in conflict or that any state law would impose an intolerable burden upon Baseball.

3. Finally, this Court should not seriously entertain Baseball's customary plea that the abuses of the reserve system, grown more restrictive since introduction of the player draft after *Toolson*, be dealt with by still another forum, this time "collective bargaining." At trial, Baseball's player relations advisor conceded that his employers have refused to this day to suggest even the slightest modification in the reserve system. (Tr. 1622-23). Indeed, rather than engage in collective bargaining on this issue, when the players' representatives recently proposed that players be freed from the restrictions of the reserve system when they reached the Social Security age of 65, Baseball refused to discuss even that modest proposal on the ground that "it would constitute a foot in the door." (Tr. 1627-29).

But even here, Baseball's sudden enthusiasm for "collective bargaining" on this issue is beside the point.

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[1] Indeed, since they do not conflict, federal and state law should both be made applicable.

This is an antitrust suit challenging a per se antitrust violation, a concerted group boycott—the kind of unlawful employer conduct which this Court has repeatedly refused to immunize from judicial scrutiny under the antitrust laws, just as the hypothetical susceptibility to collective bargaining of an unlawful employer practice does not insulate from judicial redress failure to pay a legally prescribed minimum wage, or racial discrimination in employment, or any other violation of law.

Justice requires that Baseball be put in the same position as all other professional sports—subject to the rule of law.

Respectfully submitted,

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